IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 11, 2004 Session

DOLORES SORRELLS CRAWLEY v. THE ESTATE OF JAMES F. CRAWLEY, M.D., ET AL.

Appeal from the Chancery Court for Hamilton County
No. 01-0303 W. Frank Brown, III, Chancellor

No. E2003-00263-COA-R3-CV - FILED OCTOBER 25, 2004

Dolores Sorrells Crawley ("Wife") and James F. Crawley, M.D. ("Husband") entered into a Property Settlement Agreement ("the Agreement") in their divorce in 1972. Pursuant to the Agreement, Husband was to pay Wife alimony monthly subject to certain conditions as set forth in the Agreement. Husband paid Wife alimony monthly until two months prior to his death. Wife sued the Estate of James F. Crawley, M.D. and the Trust of James F. Crawley, M.D. (collectively "Husband's Estate") claiming, among other things, that Husband's obligation to pay alimony survived Husband's death. Husband's Estate filed a motion for partial summary judgment on the issue of whether Husband's obligation to pay alimony survived Husband's death. The Trial Court granted the motion for partial summary judgment. After a final order later was entered disposing of all other issues, Wife appealed to this Court claiming the Trial Court erred in granting partial summary judgment. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Fred T. Hanzelik, Chattanooga, Tennessee, for the Appellant, Dolores Sorrells Crawley.

Marvin Berke, Chattanooga, Tennessee, for the Appellees, the Estate of James F. Crawley, M.D., and the Trust of James F. Crawley, M.D.

OPINION

Background

Wife and Husband entered into the Agreement dated April 1, 1972[1]. The Agreement was incorporated into the final decree of divorce when the parties divorced later in 1972. The Agreement provided, in pertinent part:

> 9. ALIMONY AND SUPPORT. (a) The husband shall pay to the wife, as alimony and support, the sum of Thirty Thousand Dollars ($30,000) per year, in equal monthly installments of Two Thousand Five Hundred Dollars ($2,500) per month, the first installment to be paid on the date of the execution of this agreement and future installments to be paid on each monthly anniversary thereafter.
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> (b) The liability of the husband for the payments set forth in 9(a) above shall be altered only as follows:
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> * * *
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> (3) The liability of the husband for the payments set forth in 9(a) above shall cease upon the death of either the husband or the wife.
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> * * *
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> (5) Upon remarriage of the wife, the liability of the husband under 9(a) shall be $1,350.00 per month ($16,200.00 per year), subject, however, to all the provisions of 9(b) except that there shall be no recapture pursuant to 9(b)(2).
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> (6) The liability of the husband for at least the minimum payment under 9(a) after any reductions as set out in 9(b) shall continue for the lifetime of the wife, but in no event shall the liability terminate sooner than ten (10) years from the date of the first payment.

Husband made the alimony payments as called for in the Agreement until two months before his death in July of 1998. Wife sued Husband's Estate claiming, among other things, that Husband had failed to pay her alimony monthly as provided for in the Agreement and that Husband's obligation to pay her alimony monthly survived his death. Husband's Estate answered and filed a

[1] While the copies of the Agreement provided in the record on appeal appear to be dated April 1, 1973, the parties agree that the Agreement was entered into prior to Wife and Husband's divorce in 1972. Whether the Agreement actually was entered into in 1972 or 1973 has no bearing whatsoever on the issues on appeal.

motion for partial summary judgment on the issue of whether Husband's obligation to pay Wife alimony under the Agreement survived Husband's death.

The Trial Court entered its Memorandum Opinion and Order on September 17, 2002, finding and holding, *inter alia*, that if the parties had intended for the Agreement to require payment of alimony for the life of Wife even if Husband died, they would have stated this intention clearly and unequivocally in the Agreement; that the Agreement does not contain such a clear and unequivocal statement because of paragraph 9(b)(3) of the Agreement; and that Husband's obligation to pay alimony ended upon his death. The Trial Court granted the motion for partial summary judgment.

Husband's Estate paid Wife the alimony for the two months prior to Husband's death as well as life insurance that the parties agreed Husband was obligated under the Agreement to pay. Wife filed a motion requesting prejudgment interest. In its order entered December 27, 2002, the Trial Court held that Wife was not entitled to prejudgment interest, that Wife was entitled to attorney's fees, that the Trial Court's order of September 17, 2002 is incorporated into this order, and that this order disposes of all issues in the case and is a final order. Wife appeals to this Court.

Discussion

Although not stated exactly as such, Wife raises one issue on appeal: whether the Trial Court erred in holding that Husband's obligation to pay alimony monthly ceased upon Husband's death and in granting partial summary judgment. Husband argues this is a frivolous appeal.

In *Blair v. West Town Mall*, our Supreme Court recently reiterated the standards applicable when appellate courts are reviewing a motion for summary judgment. *Blair v. West Town Mall*, 130 S.W.3d 761 (Tenn. 2004). In *Blair*, the Court stated:

> The standards governing an appellate court's review of a motion for summary judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attaches to the lower court's judgment, and our task is confined to reviewing the record to determine whether the requirements of Tennessee Rule of Civil Procedure 56 have been met. *See Staples v. CBL & Assoc., Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000); *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997); *Cowden v. Sovran Bank/Central South*, 816 S.W.2d 741, 744 (Tenn. 1991). Tennessee Rule of Civil Procedure 56.04 provides that summary judgment is appropriate where: 1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, and 2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. *Staples*, 15 S.W.3d at 88.

* * *

> When the party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact.
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> To properly support its motion, the moving party must either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense. If the moving party fails to negate a claimed basis for the suit, the non-moving party's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail. If the moving party successfully negates a claimed basis for the action, the non-moving party may not simply rest upon the pleadings, but must offer proof to establish the existence of the essential elements of the claim.

Blair, 130 S.W.3d at 763, 767 (quoting *Staples*, 15 S.W. 3d at 88-89) (citations omitted)).

Our Supreme Court has also provided instruction regarding assessing the evidence when dealing with a motion for summary judgment stating:

> The standards governing the assessment of evidence in the summary judgment context are also well established. Courts must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor. *See Robinson v. Omer*, 952 S.W.2d at 426; *Byrd v. Hall*, 847 S.W.2d at 210-11. Courts should grant a summary judgment only when both the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion. *See McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995).

Staples v. CBL & Assocs., Inc., 15 S.W.3d 83, 89 (Tenn. 2000).

The general rule in Tennessee is that:

> monthly alimony obligations do not survive the death of the obligor unless such survival is specifically provided for by the terms of a divorce decree or a contractual agreement between the parties or by some other stipulation or provision in the decree or contract which would require payments after death.

Prim v. Prim, 754 S.W.2d 609, 611 (Tenn. 1988). In *Prim*, our Supreme Court made it clear that:

> In order for an alimony obligation to survive, in our opinion, something more than the general provisions "until death or remarriage" should be required.
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> * * *
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> Survival of the obligation is the exception, not the general rule.
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> * * *
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> The cases have repeatedly pointed out that the matter is one of intention, not of law. The law itself terminates general support obligations at death because the marriage relation itself is terminated at death. Further provisions for a surviving spouse and children of an existing marriage are contained in the laws of intestacy or in the terms of wills, trusts or insurance policies. In alimony cases such further provisions must be contained in a divorce decree or in a property settlement agreement. They are not to be imposed merely by implication or from ambiguous terms.

Id. at 612.

Wife argues there is an ambiguity created by paragraph 9(b)(3) and paragraph 9(b)(6) of the Agreement and that this ambiguity coupled with Wife's affidavit attesting to the intention of the parties "clearly establishes a genuine issue of material fact in dispute" sufficient for the Trial Court to deny the motion for partial summary judgment. We disagree.

Paragraph 9(b)(3) clearly and explicitly provides that "[t]he liability of the husband for the payments set forth in 9(a) above shall cease upon the death of either the husband or the wife." Thus, under this paragraph Husband's liability for alimony was to cease upon his death.

Paragraph 9(b)(6) states that "[t]he liability of the husband for at least the minimum payment under 9(a) after any reductions as set out in 9(b) shall continue for the lifetime of the wife, but in no event shall the liability terminate sooner than ten (10) years from the date of the first payment." This paragraph, provides that if either party died within the first ten years after the Agreement was executed, Husband's liability would not terminate sooner than ten years from the date of the first payment. Thus, had Husband died within ten years from the date of the first payment, his estate would have been obligated to continue paying alimony until the ten year mark had been reached. Similarly, if Wife had died within ten years from the date of the first payment, Husband would have been obligated to continue to pay alimony to Wife's estate until the ten year mark had been reached. Husband did not die until twenty-six years after the date of the first payment, and there is no question that Husband fulfilled his obligation to pay alimony monthly for over ten years.

In addition, paragraph 9(b)(6) provides that Husband's obligation, unless terminated by his death as provided for in paragraph 9(b)(3), would continue for the lifetime of Wife, no matter what changes she made in status or lifestyle during her lifetime. Paragraph 9(b)(5) provides that even if she remarried, Wife would continue to receive monthly alimony, albeit a reduced amount, from Husband. The portion of paragraph of 9(b)(6) that calls for alimony to continue for the lifetime of Wife states it is subject to any reductions under paragraph 9(b)(3), which includes the provision that Husband's alimony obligation terminates upon the death of either party. We find there is no ambiguity created by paragraph 9(b)(3) and paragraph 9(b)(6) of the Agreement.

Wife's appellate brief also argues that paragraph 15 of the Agreement supports her argument that Husband's obligation to pay alimony monthly survived Husband's death. Paragraph 15 provides that "[i]f husband and wife, or their appointed representatives, are unable to arrive at a mutually satisfactory readjustment" should something occur to change the tax impact as called for in the Agreement, then the matter may be submitted to a court for final determination. Wife argues that paragraph 15 reflects that the parties "clearly contemplated that obligations that would trigger a taxable event may occur beyond the husband's death, or there would be no reason to provide as an alternative for an appointed representative."

Wife is correct in her assertion that the parties anticipated that a taxable event could have occurred after Husband's death. As discussed above, paragraph 9(b)(6) provides that Husband's obligation to pay monthly alimony would survive for at least ten years, even if either Husband or Wife, or both, died. Thus, had Husband died prior to the expiration of the first ten years of the Agreement, a taxable event could have occurred after Husband's death. Paragraph 15 lends no support to Wife's argument that Husband's obligation to pay alimony survived Husband's death.

There is no genuine issue with regard to the material facts and, because the Agreement clearly provides that alimony terminates after the ten year period has passed upon the death of either Husband or Wife, Husband's Estate negated an essential element of Plaintiff's claim and is entitled to a judgment as a matter of law on the undisputed facts. We affirm the Trial Court's grant of partial summary judgment.

We next consider Husband's issue regarding whether this is a frivolous appeal. "A frivolous appeal is one that is 'devoid of merit,' or one in which there is little prospect that [an appeal] can ever succeed." *Industrial Dev. Bd. of the City of Tullahoma v. Hancock*, 901 S.W.2d 382, 385 (Tenn. Ct. App. 1995) (quoting *Combustion Eng'g, Inc. v. Kennedy*, 562 S.W.2d 202 (Tenn. 1978)). Exercising our discretion, we decline to hold this is a frivolous appeal, and further decline to award Husband's Estate any attorney fees and costs incurred by this appeal.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellant, Dolores Sorrells Crawley, and her surety.

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D. MICHAEL SWINEY, JUDGE